REPORT
on
TRADE SALE OF NEW HOUSES

ONTARIO LAW REFORM COMMISSION

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DEPARTMENT OF THE ATTORNEY GENERAL

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The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, S.M., LL.D.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Dr. Richard Gosse, Q.C., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.

TABLE OF CONTENTS

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ONTARIO LAW REFORM COMMISSION

TORONTO 2
PARLIAMENT BUILDINGS

To The Honourable A. A. Wishart, Q.C.,
Minister of Justice and
Attorney General for Ontario.

THE TRADE SALE OF NEW HOUSES AND THE DOCTRINE OF CAVEAT EMPTOR

Dear Mr. Attorney:

Pursuant to the provisions of paragraph *a*, of subsection 1, of section 2 of *The Ontario Law Reform Commission Act, 1964*, the Commission initiated a study of the law of Ontario concerning defects of quality and workmanship in new dwelling houses sold in the Province. The Commission has observed that considerable anomaly exists between the protection which the law affords to purchasers of chattels and that which it affords to the purchasers of houses. After careful initial research it was decided to limit the study to the *trade* sale of *new* houses. The Commission does not at this time believe that the prospective liability of non-trade vendors or vendors of older and used homes could justly be increased. We do believe, however, that the prospective liability of those engaged in the business of building or selling new houses to the public for profit should be broadened and made more strict. The report which follows will explain the reasons for this recommendation and the details of the scheme whereby it may be accomplished.

In presenting this report we wish to express our thanks to Maurice J. Coombs, one of our research officers, for his capable assistance in the conduct of the necessary research and the drafting of this report.

I Introduction

The term *caveat emptor*, literally, "let the buyer beware", is a maxim which describes the legal principle that, in the absence of express warranty and apart from fraud or mistake, the risk of the quality or condition of the subject of a sale lies upon the purchaser. The doctrine

appears to have arisen as a part of the common law in England in the fifteenth century, at about the same period as historians date the decline of the "middle ages". Direct allusion to it in the law reports does not appear until the case of *Moore* v. *Hussey* in 1601.[1] A quarter of a century later, in 1628, Sir Edward Coke observed that the rule of the common law in sales and conveyancing situations was *caveat emptor*.[2]

As medieval times came to a close, and the hold of the Church and the feudal system on society loosened, as trade and the traders' *laissez faire* philosophy arose to dominate England, the doctrine of *caveat emptor* flourished. As one author has remarked:[3]

> ". . . *caveat emptor* developed as a legal concept as trade expanded and grew, at a time when a remedy for the vendee was becoming more and more necessary. As a concept it was perfectly consistent with the dominant economic philosophy of the period — a conscious, rationalized abandonment of each individual to his own devices with a minimum standard of public control and a minimum of imposition of standards of fair practice. Viewed in this light, the doctrine of *caveat emptor* amounts to a conscious, studied denial of relief to the injured vendee in a period of expanding trade activity when the prevailing conditions seem to have demanded increasingly some form of societal protection."

In the early law, a vendor of chattels was liable for defective goods in the absence of actual fraud only on proof of an express warranty. Gradually, however, up to the close of the eighteenth century, this narrow class of cases was expanded so that warranties might be implied from the facts when there was a mere affirmation or description of quality.

In the nineteenth century the courts began to find warranties of quality arising by implication of law as well as by inference from the facts. Thus, where there was an executory contract for the sale of goods identified by description the contract was interpreted as being not just for any goods of such description, but for goods of merchantable quality. Where there was an executed contract for the sale of specfied goods a vendor might or might not be held liable on an implied-in-law warranty. Such liability depended upon such matters as the degree of reliance placed by the vendee on the vendor's skill and judgment, any opportunity for inspection which the vendee may have had, and the existence of any particular purpose for which the vendee may have bought the goods and which he had communicated to the vendor.[4]

By the end of the nineteenth century it was obvious that three hundred years of case-law was not adequate to the requirements of certainty and clearness necessary in an advanced commercial com-

[1]Hob. 93, at page 99, 80 E.R. 243.
[2]Co. Litt. 102, a.
[3]C. J. Morrow, "Warranty of Quality: a Comparative Survey" (1940), 14 *Tulane Law Review* 327, at page 330.
[4]See the decision of the Court of Queens Bench delivered by Mellor, J. in *Jones* v. *Just* (1868), L.R. 3 Q.B. 197. This case is an admirable statement of the developed English law.

munity. The result was the passage of the *Sale of Goods Act, 1893*.[5] This Act, drafted by Sir M. D. Chalmers with the assistance of the treatises of Blackburn and Benjamin on the law of sale, professes to codify the law of sale as it pertains to personalty. This statute was adopted in Ontario in 1920.[6]

The importance of the *Sale of Goods Act* for our purposes lies in the fact that while paying lip-service to *caveat emptor* with such expressions as ". . . there is no implied warranty or condition as to the quality or fitness . . . of goods . . . except as follows:— . . .",[7] it virtually destroys the doctrine in the majority of sales situations. As a result, the law governing sales of goods is now substantially free from it. The same cannot be said for the law dealing with the sale of land, which has undergone no similar development.

From early times the law regarding the existence of warranties was similar whether houses or goods were the subject of the sale. At about the end of the eighteenth century a widening divergence developed between the law relating to defects of quality in the sale of goods and defects of quality in the sale of houses. The law governing house sales has remained practically unchanged since that time. The general rule was and is that apart from express warranties of quality, or warranties which may be inferred clearly from the factual situation, the rule *caveat emptor* applies in all its rigour and strictness.

The causes of the divergence are plain. The development of factory and mass produced goods and the explosion of the consuming public under the influence of the industrial revolution, wrought a change in the social pressures exerted upon the law in the nineteenth century. In the presence of mass production, mass buying, mass selling, and mass distribution of goods, where quality is no more than a statistical mean, the consumer demanded, and was entitled to demand, that some protection be given him when he entered the market place. The articles he bought might have been made by processes neither examined nor understood by him. They might have been made by a factory whose owners and workers were unknown to him. They might be marred by defects undiscoverable at the time of sale except by expert examination or destructive testing. In short, the complexity of increasingly modern industry and society required that the law defend the consumer as much as is possible from forces over which he had no control and of which he had little or no knowledge.

It was not until the twentieth century that the house-building industry achieved a level of production comparable to that achieved in the manufacture of goods in the nineteenth century. Profound changes in the composition of society and the advent of extensive taxation of family pools of wealth were necessary before the pattern of buying and selling land would change. For better or worse these factors have been present in abundance since 1914.

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[5]56 & 57 Vict. c. 62.
[6]S.O. 1920, c. 40. Now, R.S.O. 1960, c. 358.
[7]Section 14 of the English Act; section 15 of the Ontario Act.

Whereas formerly, as a general rule, land changed hands relatively rarely and mainly between parties who knew and understood it, and most building was undertaken by owners employing architects and contractors, in this century nearly every person with a family is a potential home-owner. In most cases a purchaser buys a house which is one of a fair number of copies of one of several "models" offered for sale in a large subdivision. The model chosen is selected because it looks nice, the wife likes it, and it is to be built close to schools, shopping, and transportation. Some kind of beam-slapping, brick-kicking inspection may be performed on the model home, or even on the specific unit purchased during its construction. This, however, is most likely merely an exercise to satisfy the buyer's own opinion of himself as man the builder, man the provider, man the technical expert. It is axiomatic that the average such potential home-owner knows less about the house he may buy and the land around it than about the car he drives. Thus, it has not been until recent times that the need for consumer protection in the housing market has reached the same proportions as that reached in the market for goods in the last century.

II The Present Law in Ontario

We will now proceed with a discussion of the law of Ontario governing the sale of new homes. As we have observed this area of law has remained virtually unaltered since the eighteenth century. *Caveat emptor* dominates the jurisprudence. There are, however, some points which have been developed since the beginning of this century and which should be examined.

There are three situations of interest to this study: (1) the trade sale of houses yet to be built; (2) the trade sale of houses as yet uncompleted and still in the course of construction; and (3) the trade sale of completed homes. It should be emphasized that we are not here concerned with the case where an owner of land contracts to have a home built for him. Our interest lies with those instances where a purchaser goes into the market to buy house and lot as an entity. He is shown plans and artists' drawings, or a model house, or the finished structure which he will buy, and he makes his purchase, in a subjective sense, in the same way as he buys his automobile.

In the first two situations (the trade sale of a house yet to be built and the trade sale of an uncompleted house still in the course of construction), the law implies a warranty that the house when completed will have been erected in a workmanlike manner and will be fit for habitation. The reasoning behind this implied warranty is that since the purchaser is buying not only such land and structure as he can see before him but also the builder's obligation to complete the edifice, it is of the very nature and essence of the transaction that the house will be fit to come into as a dwelling-house.[8]

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[8]*Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113, [1931] All E.R. Rep. 93; *Perry* v. *Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390; *Croft* v. *Prendergast*, [1949] O.R. 282.

In the third case, the trade sale of a completed house, no warranties of quality will be implied and the doctrine of *caveat emptor* applies in all its force. Apart from fraud, misrepresentation, and any rights created by contract, the purchaser buys at his peril.[9] This is so whether any defects which may exist are patent or latent.

Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of the purchaser.[10] The vendor of a completed house is not bound to point out patent defects, the rule being *caveat emptor*. It is up to the purchaser to inspect and inquire to his satisfaction. He cannot later be heard to complain if his inspection or inquiry has not been thorough enough.

Latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.[11] The principle appears to be that unless a purchaser complaining of a latent defect of quality pleads and proves fraud or breach of warranty he has no remedy either in damages or by rescission.[12] Silence, mere failure to point out a latent defect of quality will not normally alter the rule. If, however, some special circumstances exist, such as the defect being one which the purchaser has no means of discovering and which renders the property useless to the purchaser for the purpose for which, to the vendor's knowledge, he wishes to acquire it, the vendor's failure to disclose the defect will bar him from obtaining specific performance and he may be ordered to return any deposit paid. It therefore appears that in the sale of a completed house, the rule *caveat emptor* applies in all cases where provable fraud or bad faith are absent.

Even in the cases where partially completed houses or houses yet to be built are concerned the implied warranty of workmanlike construction and fitness is easily lost in the presence of express terms in the contract. If, for instance, there is a term specifying the way in which the building is to be completed, or if there is a convenant by the purchaser that having inspected the property he is satisfied with it and he agrees to pay for any alterations required by him, no warranty will be implied. A term, moreover, which declares that "there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing",[13] will effectively avoid any warranty implied by law.

III Shortcomings of the Present Law

The principal objection which may be levelled against the present law is that it is difficult to rationalize a distinction between the positions

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[9] *Idem.*

[10] See *McCallum* v. *Dean and Dean*, [1956] O.W.N. 873, at page 877; and Halsbury, *Laws of England* (3d ed.), Vol. 34, § 353.

[11] See Halsbury, *cit. supra.*

[12] See *Scott-Polson et ux.* v. *Hope* (1958), 25 W.W.R. 447 (B.C.), 14 D.L.R. (2d) 333; also, DiCastri, *Canadian Law of Vendor and Purchaser* (1967), § 203, at pages 155 *et seq.*

[13] See the Toronto Real Estate Board, *Agreement of Purchase and Sale*, reproduced in (1962), 20 *U. of T. Fac. of Law Review* at page 94. Note also that in the first two lines of the Agreement the purchaser admits having inspected the property.

of purchasers of completed homes and purchasers of partially completed or as yet unbuilt homes. Classically, it is argued that the purchaser of a completed home has an opportunity to inspect his future home not available to the purchaser of an uncompleted home. The former is therefore obliged to suffer the rule *caveat emptor*, while the latter is granted the implied warranties of fitness and workmanlike construction. Inspection by the ordinary purchaser, however, is unlikely to reveal more than the most patent of defects, and it is perhaps expecting a great deal of a man of small or average means to hire a builder to go with him to inspect the premises of a new house in a modern subdivision. Furthermore, there may be important defects (*e.g.* in damp-proofing or in insulation) which a casual inspection, even by a trained person, might not reasonably be expected to reveal. Such problems as dampness or porousness may be revealed only after the house has been occupied for some time.

Of even greater significance, however, is the fact that such implied warranties of workmanship and fitness as are recognized by our law may be displaced easily by express contractual provisions. The raw truth is that the purchaser of any home may be subjected to the rule *caveat emptor* by the express but not necessarily obvious terms of the contract of sale. In the face of standard form contracts and "take it or leave it" selling the results can be awesome. In practical terms a house purchaser may never have a real ability or opportunity to inspect the home which he buys. He may be quite unable to bargain for any contractual protection against built-in defects in quality. The law to which he turns for aid offers him neither redress nor solace.

In these days of mass-produced housing it seems unreasonable to force purchasers under a rule which arose in a society where relatively only a few owned and dealt in land. The introduction of mass-produced goods defeated *caveat emptor* in the law governing the sale of chattels: it is not unreasonable to seek a similar result in the law governing the sale of houses. In the Irish case of *Wallis* v. *Russell*, decided in 1902,[14] Fitzgibbon, L.J. said: "*Caveat emptor* does not mean in law or Latin that the buyer must take a chance, it means that he must take care." As it operates in Ontario at the present time, *caveat emptor* may well mean quite the opposite.

IV Solutions Attempted in Other Jurisdictions

In accord with its belief that comparative study is an essential element of law reform, the Commission has undertaken close study of approaches taken to the question of defects in quality in new homes in other jurisdictions. Careful attention has been paid to the law and practice of the United Kingdom, the Province of Quebec, the State of Louisiana, the State of New York and the general American jurisprudence.

1. *The United Kingdom*

The English Law Commission has for some time been engaged in a study of the liability of trade vendors of new homes. There has also

[14][1902] 2 I.R. 585, at page 615.

been some significant agitation and debate in the House of Commons in the last few years in favour of some increased measure of liability and control over builders and vendors of new houses. In 1962 and 1963 a private members' bill entitled the *Private House Owners (Protection) Bill* was introduced but failed to achieve more than first reading. The essential features of this bill were: first, compulsory registration of builders; second, the requirement that builders conform to certain minimum standards of quality; and third, the requirement that builders insure against the cost of completing work left undone as a result of the builders' bankruptcy. Neglect to register would be punishable on criminal prosecution and local authorities would have the power to refuse or to cancel registration.

In 1964, 1965, and 1966 unsuccessful attempts were made to secure the passage of another private members' bill, the *House Buyers Protection Bill.* The operative text of this Bill, taken from Bill No. 58 of 1966, was as follows:

> 1. (1) In the construction of any dwellinghouse to which this Act applies—
>
> (*a*) all materials supplied for or used in such construction shall be reasonably fit for the respective purposes for which such materials are supplied or used; and
>
> (*b*) every such construction and all works connected therewith shall be carried out in a proper and workmanlike manner.
>
> (2) Both the vendor and the builder shall be liable for any breach of either of the conditions contained in subsection (1) of this section:
>
> Provided that no action shall be brought except in respect of defects of which written notice shall have been given to such of them as it is desired to make liable hereunder within two years after the dwellinghouse shall have been first inhabited.
>
> (3) The benefit of the foregoing provisions of this section shall inure to any purchaser, irrespective of any lack of contractual relationship between that purchaser on the one hand and the vendor and the builder or either of them on the other hand.
>
> 2. This Act shall apply to the construction or reconstruction of one or more dwellinghouses in or upon any land and the phrase "the construction of any dwellinghouse to which this Act applies" shall be construed accordingly.

In 1965, still another private members' bill was put forward and failed of passage. The provisions of the *Housebuilding (Protection of Purchasers) Bill* made an attack upon the problem in the areas of (1) self-discipline in the building industry, (2) alteration of the law, and

(3) new methods of controlling individual builders. First, there was to be set up a Housebuilding Standards Agency which was to keep a register of builders, to investigate complaints, and to exercise powers of expulsion in proper cases. Builders believing themselves aggrieved of the decisions of the Agency were to have a right of appeal in the High Court. Second, the Bill would have imposed warranties on the finish of a house for two years and on the structure for five years. Claims under the warranties would have been settled by conciliation and arbitration procedures. Third, the Housebuilding Standards Agency was to have the power to stipulate standards, to inspect houses in the course of construction, and to issue or withhold certificates of compliance with the provisions of the legislation and the standards laid down under it. A procedure was to be available whereby builders could appeal the findings of the Agency.

All of the foregoing bills were either talked out or were withdrawn. With the acquiescence of all political parties the resolution of the matter was left to the Law Commission and the government. The Law Commission, however, decided to recommend only very limited legislation imposing liability respecting new house sales. It was the opinion of the Law Commission and, indeed, of the government, that those builders who bind themselves to the hitherto private and voluntary scheme administered for thirty years by the National House-Builders Registration Council need not be made the subjects of statutory changes. The N.H.B.R.C. scheme is said by the Law Commission to offer better safeguards to purchasers than they could possibly derive either from the existing law or from any conceivable new legislation.[15] Those builders who do not join the scheme will be made liable to a civil remedy for failure to carry out the statutory duty to adhere to building regulations. The form of the draft legislation creating this liability and the final Report relating to it have not yet been published. The imminent appearance of these documents is noted, however, in the Law Commission's *Third Annual Report, 1967-68* (22 July, 1968).

In the light of the Law Commission's recommendation and the British Government's decision to act thereon, it is instructive to review the salient features of the scheme administered by the National House-Builders Registration Council.[16]

(*a*) *The National House-Builders Registration Council*

Formed in 1936, mainly through the initiative of the National Federation of Building Trades Employers, the N.H.B.R.C. has always been at pains to point out that it is an autonomous, non-political, non-profit-making body whose aim is to raise the status of the house-building industry and to counter the criticism which has often been levelled at the standards of private house-building.

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[15]*National House-Builders Registration Council, 1936-1966* (1966), a monograph published by the Council to explain the changes in its constitution and scheme which were wrought during 1966, at page 6.

[16]The historical background of the Council will be found in the *Report of the Working Party on House-Builders' Registration* (1964) and the monograph already mentioned, *National Housebuilders Registration Council, 1936-1966.*

Since its founding the Council has adhered to three principles initially enunciated by the National Government in 1936. These are:[17]

(1) the building and buying of a house is not a matter for builders only; builders must be a minority on the Registration Council;

(2) the Members of the Council must not be self-elected but nominated by the various official bodies connected with housing;

(3) the scheme must include inspection and specification as well as warranty.

In accord with the first two of these, the Council has among its members representatives of an extremely diverse selection of highly respected professional, administrative, consumer, and other organizations.[18]

Although building employers are the largest single group in the Council, they represent a minority of one-third. Members are all leaders in their own fields and their service on the Council is voluntary and unpaid. Working under them is a paid staff which includes a body of about 200 technical people spread throughout the nation.

The Council is financed by a fee of six guineas levied for every house built by a registered builder. The most remarkable thing about this fee lies in the extent of the service which it obtains for purchasers by way of the Council's "Scheme".

(*b*) *The N.H.B.R.C. Scheme*

There are six elements to the protection offered to purchasers of houses built by builders registered with the N.H.B.R.C. These are the following:

(i) inspection;

(ii) builders' two-year guarantee;

(iii) insurance in the third to tenth years;

(iv) arbitration procedure;

(v) the undertaking by the Council to implement any arbitration award should the builder default; and

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[17]*Ibid.*, note 15, at page 5.

[18]Among the members of the council are representatives of the following organizations: The Royal Institute of British Architects; The Royal Institution of Chartered Surveyors; The National Federation of Building Trades Employers; The Building Societies Association; The National Federation of Building Trades Operatives; The Council for the Preservation of Rural England; The Rural District Councils Association; The Urban District Councils Association; The Institution of Municipal Engineers; The Society of Medical Officers of Health; The Chartered Auctioneers' and Estate Agents' Institute; The Consumer Council; The National Federation of Owner-Occupiers' and Owner-Residents' Associations; The National Council of Women of Great Britain; The Women's Advisory Committee of the British Standards Institution. Observers from the Minister of Housing and Local Government, the Minister of Public Building & Works, and the Greater London Council attend at all meetings.

(vi) protection against builder bankruptcy.

The core of the scheme is found in the legal Agreement HB 5,[19] a document prepared with the assistance of the Law Commission. A copy is annexed to this report. The Council's Rules require that before making a contract to build or lease, registered house-builders or probationers (those not yet fully accepted as full-fledged registrants) must offer in writing to enter into this agreement with purchasers.[20] In addition, the Council recommends that the purchaser ensure that the contract of sale provides that the builder will offer to enter into Agreement HB 5. Form HB 4 suggests that the following clause be included in the contract of sale:

> "The Builder warrants that he will offer to enter into the form of Agreement prescribed by the National House-Builders Registration Council."

Should a registered house-builder fail to offer to enter into Agreement HB 5, under clause 13 (a) of the Council's Conditions of Registration and Rules, the Council may order the builder to pay a purchaser the amount of any loss the purchaser has had to bear as a result of that failure. If the registered house-builder fails to make the payment the Council may strike his name from the Register and may in addition to or instead of this action itself pay the purchaser the amount of his loss. The Council has reserved a right of set-off or an action over against the builder in the latter contingency.

Under Agreement HB 5 the builder warrants, among other things, "that the dwelling has been built or agrees that it will be built: (1) in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation and (2) so as to comply in all respects with the Council's Requirements[21] and (3) so as to qualify for the Certificate."[22] The builder further agrees to "make good within a reasonable time after receipt of the Purchaser's report and at his own expense any defects in the dwelling which are consequent upon any breach by the builder of the Council's Requirements and which are reported in writing to the Builder within the initial guarantee period."[23] The "initial guarantee period" is defined in the Agreement[24] as being two years from the date of issue of the N.H.B.R.C. certificate or one year from the date of completion of the purchase, whichever ends later. Thus, if he obtains Agreement HB 5 from his builder, a purchaser may reasonably entertain some certainty of workmanlike construction, fitness for habitation, a minimum standard of quality in materials, workmanship and design, and a two-year warranty against defects.

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[19]Form HB5 in Part 1 (Legal) of the *Registered House-Builders Handbook*. The *Handbook* is a comprehensive collection of instructions, requirements, and specifications, both legal and technical, serving as a guide to registered house-builders.

[20]Rule 7 of Section B of Part 1 of the N.H.B.R.C. Conditions of Registration and Rules, Form HB1 in the *Handbook*.

[21]The Requirements are set out in the *Handbook*, Part 2 (Technical).

[22]Clause 3 of Agreement HB5. The "Certificate" referred to is the certificate given by the Council when the dwelling has been completed to the satisfaction of its inspectors. The importance of the certificate lies in the indemnification to which it entitles the purchaser in certain eventualities.

[23]Clause 5 of Agreement HB5.

[24]Clause 1 of Agreement HB5.

In addition, a purchaser is entitled to certain "insurance" benefits if a certificate has been issued for the house which he is buying.[25] First, if during the first two years, defects occur which an arbitrator[26] says should be remedied and the builder does not remedy them the owner will be recompensed by the Council up to the amount of £5,000.[27] Second, from the end of the second year to the end of the tenth year the house is insured to the extent of £2,500 by the Council against major structural damage consequent on failure of the builder to comply with the N.H.B.R.C. requirements.[28] The Council, in a pamphlet distributed to the public,[29] makes the following observations on the ten-year protection under the Agreement:

> "Broadly, it is intended to cover such items as subsidence or settlement (other than that covered otherwise by legislation), dry rot, collapse or serious distortion of joists or roof structure, or chemical failure of materials (these are given as examples only); *it does not cover minor structural items or non-structural items such as a leaking gutter, flaking paintwork, rusty rainwater pipe, cracked fireback or damage to finishes.* Nor will it cover defects which are due to the negligence of the purchaser, including failure to carry out reasonable maintenance. In this connection it should be stressed that some defects, such as wet rot, would be unlikely to occur after two years in a well-maintained house and claims would not then be met unless it could be shown beyond reasonable doubt that failure to comply with the Council's standards was in fact the cause. The cover will not include theoretical defects, for example the joists in a house would not be replaced because it was found that they were slightly undersize (as many joists are) there would need to be evidence that they were giving rise to trouble, or were likely to do so.
>
> "It must be stressed that this protection policy is a cover against major defects due to faulty building and will not relieve the house-owner of his normal maintenance responsibilities or the need to carry out minor household repairs. Moreover it does not cover items covered by an ordinary householder's insurance policy: these include damage due to storm and tempest."

The third of the insurance benefits which a purchaser derives from the scheme is that should a registered builder be unable by reason of bankruptcy to remedy defects resulting from failure to comply with the Council's requirements, the Council undertakes to indemnify the purchaser.[30]

By these means purchasers from registered house builders can be assured of a considerable degree of protection against defects of quality for the first ten years of the life of their homes.

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[25]See the First Schedule to Agreement HB5 (Purchaser's Copy) and, principally, rules 11 and 12 of Section B of the Council's Conditions of Registration and Rules (Form HB1 in the *Handbook*).

[26]Provision for impartial arbitration is made under clause 12 of HB5.

[27]Paragraph B(1) of the First Schedule to HB5.

[28]Paragraph B(2) of the First Schedule to HB5.

[29]The pamphlet is entitled "SAFEGUARDS to which new house buyers are entitled." (February, 1968).

[30]Paragraph A of the First Schedule to HB5.

Mention has been made of the N.H.B.R.C. certificate. In Section C of the Council's Conditions of Registration and Rules and in clause 1 of Agreement HB 5, "Certificate" is defined as:

> "The Certificate issued by the Council to a House-Builder to be passed on to a purchaser of a dwelling certifying that a dwelling has been inspected periodically during construction and that so far as was seen the standard of workmanship and materials were substantially in accordance with the Council's Requirements."

Unless such a certificate has been issued, the purchaser is not entitled to the indemnification and insurance provided by the Council. The certificate will not be issued unless and until the builder has complied with all the Rules set out in Section B of the Conditions of Registration and Rules. Nevertheless, the purchaser of a house which does not qualify for certification is not left wholly unprotected. The builder may well be liable to removal from the Register if he does not bring the house up to the standard required. In any event, where the builder has agreed to enter into or has in fact entered into Agreement HB 5 the purchaser may be able to sue for damages, specific performance, or rescission. The Council has, moreover, bound itself to give purchasers protection, to the extent of £750, against the bankruptcy or fraud of a registered house-builder.[31]

Under the Council's Conditions of Registration[32] a registered house-builder must apply fourteen days before the commencement of work on the site to have any house or houses which he is going to erect inspected by agents of the Council. Every dwelling which he builds must, as a bare minimum, be constructed so as to satisfy, in all respects, the published "Requirements" of the Council. In order to help ensure that this is done, the registered builder must make available to the Council's inspectors "all necessary facilities at all reasonable times to enable them to carry out inspections . . . and to take such samples of materials as they may wish for the sole purpose of testing."

Should a builder fail to apply for inspection or refuse to give facilities for such inspection then the Council may, *inter alia*, strike his name from the register, and in addition, may decide to pay the purchaser the amount of any award of damages made against the builder for breach of warranty if he has himself failed to satisfy the award within two months of its being made. The Council may recover by set-off or by action against the registered builder any sum so paid.[33]

Inspections are carried out by the more than 200 technical field staff employed by the Council and stationed throughout the country. Each house is visited five to ten times during construction with the total on-site time ranging from one to four hours per dwelling. Housing developments of all grades of quality are visited, not only those where

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[31] *Id.*

[32] Rules 3 to 6 of Section B of the Conditions of Registration and Rules, Form HB1 in the *Handbook*.

[33] Clause 13 (b) of the Conditions of Registration and Rules.

the Council expects to find substandard work. It is claimed by the Council that good builders welcome the assistance of the inspector in maintaining quality control.

The Council is careful to point out that its inspection system is not foolproof. Each year there are a number of houses certified which are flawed by defects (some major but most minor) which might have been caught. This, however, is not really a valid criticism of the scheme. The purchaser loses none of his legal rights if the certificate is wrongly issued. The builder cannot claim that the certificate is any evidence of a lack of defects in the construction. It is also demonstrable that houses built outside of the scheme suffer from defects more often than those built under it, and that when a house built under the scheme does suffer from a defect, it is usually less severe than defects found in other houses. In its pamphlet entitled "SAFEGUARDS", the Council explains the limitations of its inspection service to the public in the following manner:

> "The main object of these spot-check inspections is to enable the ten-year certificate to be issued. They are additional to those carried out by the local authority and often prevent defects which would be hidden, even from a trained surveyor, when the house was completed. Inspectors are, however, not there all the time and cannot guarantee to prevent all defects anymore than, say, local Health Inspectors can guarantee that no coffee cup in a restaurant will have a chip in it. In particular, there is not enough time for inspectors to examine the work of the finishing trades which, after all, purchasers can see for themselves."

As to the degree of success of this scheme, the following claim is made:[34]

> ". . . there were during 1966 very few cases of major defect. During the year, however, the Council found through investigation of complaints sixty cases in which it seemed that defects, which were more than minor finishing defects, might reasonably have been prevented during inspection. Each of these instances was, of course, drawn to the attention of the area supervisor and the inspector concerned. This is one side of the balance sheet. On the other hand, an analysis of the work of the inspectors showed that thousands of defects, mostly minor but a few major, were prevented each month. Some would have been bye-law contraventions; other were not. Typical examples of faults more commonly found are: misplaced damp-proof courses, dirty wall-cavities, undersized roof and floor timbers, and poor finishes (in paint, plaster, woodwork or brickwork). All such defects, of course, are required to be rectified as soon as possible after discovery before the issue of a certificate."

Speaking generally, the Council's aim is to encourage all builders to have first-class supervision of their own. The role of its inspectorate is mainly precautionary and is offered as much as a service to the builder as to the purchaser. As a result, a large part of an inspector's job consists of ensuring that the builder's site supervision is adequate.

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[34] *National House-Builders Registration Council, 1936-1966* (1966), at page 9.

Those of the public who reap the greatest benefit from the N.H.B.R.C. inspection are the purchasers of "speculative housing." Whereas the purchaser of a house which is to be built to order can, and often does, arrange privately for inspection by an architect during the course of construction, the purchaser of a house built on "spec" has no opportunity to do so. In cases where the purchaser has made arrangements for such private inspection the Council will free the builder from the inspection obligation imposed by the Rules; but only if the purchaser (not the builder) so requests.

Finally, a word should be said about the provisions for arbitration. Under the N.H.B.R.C. Code of Conduct[35] the following procedure is laid down in cases of dispute:

> "Where a dispute arises between builder and purchaser, and all reasonable attempts to solve it have failed, the Council may give an opinion on what remedial work needs to be done. This opinion is offered as the basis for reaching settlement and either party may reject it and instead go to arbitration. If the registered builder does not choose to go to arbitration, then he must carry out the work (if any) recommended in a workmanlike manner and within a reasonable time."

The arbitrator is appointed by the Presidents of the Royal Institute of British Architects and of the Royal Institution of Chartered Surveyors. The procedure on the arbitration is governed by the *Arbitration Act, 1950*, and the arbitrator has the same power to award damages in the matter as a judge of the High Court.

2. *The Civil Law — Quebec and Louisiana*

Although there are several states in the United States which, as a result of their histories, employ civil law principles in selected areas of their law, it is fair to say that the State of Louisiana and the Province of Quebec are the only true civil law jurisdictions of the 61 north of the Mexican border. As such, their approaches to the solution of problems in a North American environment are valuable items for comparative study. We have therefore canvassed the jurisprudence of these two jurisdictions respecting liability for defects in the sale of new houses. In pursuing this study we discovered two areas of interest. First, the actions of redhibition and *quanti minoris*, and second, actions against builders (*les entrepreneurs*) where buildings "perish" in whole or in part (*l'édifice périt en tout ou en partie*).

(*a*) *The Redhibitory Action*

It should be kept in mind that in the civil law the redhibitory action and the action *quanti minoris* apply to sales of both movable and immovable property. The definition of "redhibition" given in Jowitt, *Dictionary of English Law* (1959), is misleading on this point.

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[35]Included in the *Handbook* as Form HB2.

Redhibition consists of the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice.[36] The basis of the action is a warranty which the law implies in the contract of sale, that the thing sold will be free from latent defects.

Williston describes this action by using the word "rescission" in the place of "redhibition".[37] Although similar to it, however, redhibition is not directly related to the remedy of rescission available in English law. Its origin can be traced back to the edicts of the *aediles* in ancient Rome,[38] and its foundation is the concept of cause which underlies the civil law approach to contracts. Williston points out that "[it] appears as if the situation was looked upon as a sale induced by mistake, rather than as a case where the seller was guilty of a breach of contract."[39] Pothier explains, however, that the obligation to warrant against vices rendering the things sold useless [". . . , or even sometimes hurtful,. . . "] for the purpose for which it was bought and sold arises from the nature of the contract itself. "[F]or, to be obliged *to cause him to have the thing*, in the intention of the parties, is to be obliged to cause him to have it usefully; and it is in vain for the buyer to have a thing usefully which cannot be of any use to him".[40] Pothier continues:

> "These defects, against which the seller is bound to warrant are called redhibitory, because the action, which results from this warranty, is a *redhibitory* action, that is to say, an action by which the buyer concludes against the seller, that he should be held to take back the thing, and to return the price: *redhibere est quasi reddere*; D. 21, 1, 21."

It is a point of interest that throughout the civil law world this warranty is classed together with a warranty, similarly implied, that the purchaser shall have quiet title to the thing sold — the so-called warranty against eviction. Marler juxtaposes the two warranties as follows:[41]

> "Warranty against eviction assures the peaceable, warranty against latent defects the useful, possession of the thing purchased. One buys a thing, says Domat, (I.L. 1, tit. 2, sec. 11, No. 5) for use; if some defect should prevent or diminish the expected usefulness, the seller must not profit from a value the thing appeared to have, but did not have."

We have pointed out that the seller is liable to warrant against certain defects or vices which are termed redhibitory. All authorities agree that four conditions must be satisfied in order to raise this warranty. First, the defect must be latent. Second, it must be so serious

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[36] *Black's Law Dictionary* (1944).
[37] *Williston on Contracts*, Revised Edition, Vol. 5, at page 4116, § 1472.
[38] See the exhaustive historical summary contained in Morrow, "Warranty of Quality: a Comparative Survey" (1940), 14 *Tulane Law Review* 327.
[39] *Op. cit.*, at page 4116, § 1472. Professor Morrow enlarges upon this statement at page 552 of his article cited in note 38.
[40] Pothier, *Treatise on the Contract of Sale*, translated from the French by L. S. Cushing, 1839, at § 203.
[41] Marler, *The Law of Real Property — Quebec* (1932), at page 250, § 529.

as to render the thing sold unfit for the use intended, or so diminished in usefulness that the purchaser would not have bought it had he known of it. Third, it must have existed at the time of sale. Fourth, it must have veen unknown to the purchaser.

Those defects which are obvious or would be perceived on a simple inspection are not latent. "A wrong, which a person suffers through his own fault, is not one which the law ought to relieve against, the law not being made to assist the negligent. . . ."[42] As examples of such non-redhibitory defects, Pothier cites lameness or blindness in a horse, and "in a house, to be ruinous." The test is purely objective. Ignorance, gullibility or inexperience are no excuse if a person of normal competence would have discovered the defect. If, however, anything exceeding an ordinary inspection is required to reveal the defect, it is considered latent. Speaking of the law of France, for instance, Professor Morrow states:[43]

> "In buying a house, some authorities require an architect's inspection before protecting the vendee, but in no case would a defect of construction be apparent if it would necessitate the demolition of walls or floors to discover. Inspection which requires expert knowledge or scientific method ordinarily will not be required of the vendee, and the defect which can be ascertained only by means of such an inspection is said to be "hidden" within the meaning of these articles [on redhibition in the Civil Code of France.]"

The following are examples of faults which have been found to be latent defects: rotten beams between floors and ceilings, bad quality mortar employed in the walls, bad condition or insufficiency of foundations,[44] an imperfect wooden drain connected with the street sewer when the character of the house made it to be presumed that it had a proper drainage system,[45] the basement of a house which was subject to an inflow of water,[46] use of unfit materials in plastering and unseasoned wood for doors,[47] rotten wainscoting inside the walls,[48] a defective heating system and cracks in the foundation.[49]

It is necessary also, that the intended use of the thing sold be impaired. Defects may affect many qualities thought to be present at the time of the sale, but unless they detract from the intended use they are not redhibitory. Marler, citing *Guillouard on Sale*, makes this observation:[50]

> "The question to be solved is not whether the defect can be made good, but whether, the thing, in the condition in which it was sold, is improper for its intended use, or whether the purchaser would have

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[42]Pothier, *cit. supra*, § 208.
[43]*Cit. supra*, at page 531.
[44]*Lacrois et vir.* v. *Bigras* (1928), 66 S.C. 50.
[45]*Ibbotson* v. *Ouimet* (1876), 21 L.C.J. 53.
[46]*Masse* v. *Fraser* (1914), 23 K.B. 247.
[47]*Phelan* v. *Montreal Investment Company* (1908), 35 S.C. 72.
[48]*Gagnon* v. *Houle* (1923), 34 K.B. 11.
[49]*Tellier* v. *Proulx*, [1954] S.C. 180.
[50]Marler, *op. cit. supra*, § 531.

paid so much had he known of it. If the purchaser intends to use the property for some special purpose, it is for him to make this known to the seller."

Clearly, the defect must have existed at the time of the sale. Once the sale has been completed the property is at the risk of the purchaser.

Finally, the purchaser's knowledge of the defect excludes any but express warranties. The warranty which may be implied by law is renounced as to what the purchaser knows. Interestingly, the seller's state of knowledge is irrelevant as far as liability is concerned, the principle being that so long as the purchaser was deceived it matters not whether he was deceived by his vendor's ignorance or bad faith.[51] The seller's knowledge may, however, affect the quantum of damages which the purchaser can recover.

The basis for the redhibitory action has been set out in the civil codes of both Quebec and Louisiana: Article 1522 of the Quebec Code and article 2520 of the Louisiana Code.

Civil Code of the Province of Quebec, article 1522:

"The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought, or would not have given so large a price, if he had known them."

Civil Code of Louisiana, article 2520:

"Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."

Both are derived from the French code of 1804, the Code Napoleon, article 1641. These articles are not, of course, exhaustive and they are followed by others which define the warranty and the redhibitory action more particularly.

Of importance equal to the redhibitory action is the action *quanti minoris*.[52] Traditionally, the purchaser has had an option in cases where redhibitory defects appear, either to seek redhibition and return the thing purchased or to demand a diminution of the price and keep the object of the sale. In France and Quebec the option is exercisable at any time before judgment.[53] Whichever action the purchaser chooses will determine the type of relief he gets if he is successful. So too in Louiiana,[54] except that the court has a discretion where redhibition is sought,

[51]*Id.*
[52]Article 1526 of the Quebec Civil Code; article 1644 of the French Civil Code.
[53]Marler, § 532; Planiol and Ripert, *Treatise on the Civil Law*, Vol. 2, § 1465.
[54]Article 2541 of the Louisiana Civil Code.

either to grant redhibition or to hold the claimant only to *quanti minoris* relief.[55] The action *quanti minoris* is in other respects the same as the redhibitory action.

There are four defences which can be raised in answer to the redhibitory action:[56] (1) that the agreement of sale contained a non-warranty clause; (2) that the purchaser has waived his right to the redhibitory action; (3) that the subject of the sale has perished and hence cannot be returned; and (4) that the purchaser's action is prescribed.

As regards non-warranty clauses, it is clear that they are permitted in both Louisiana and Quebec.[57] It has been held in Louisiana that express words of non-warranty are required if the buyer is to lose his redhibitory action. In Quebec, the phrase "as is" or its French equivalent has been held sufficient to exclude the implied warranty, but the phrase "no warranties except those endorsed hereon" has been held insufficient. In practice, it appears very difficult for builders to avoid liability by non-warranty clauses in the sale of houses. The policy seems to be that it is difficult for a buyer properly to inspect a house and it is very much easier for the builder to be aware of faults he has created. The buyer must consent to take the subject of the sale in its existing condition rather than give a general release to the seller. In any event, regardless of the words used, if the seller knew of the defect or may be deemed to have known of it at the time of sale, and did not inform the buyer by some active declaration, no exclusionary clause will be effective to relieve him of his obligation on the redhibitory action.[58]

Although in Louisiana it has been held that the common law doctrine of waiver applies in that state, it is questionable whether the warranty of quality raised by the code can be extinguished by any means other than those set out in the code.[59] Waiver is not, it appears, one of these means.[60] Nevertheless, the Louisiana courts have said that the extinguishment article of their code is not exclusive of a number of particular causes of extinction applicable to each peculiar kind of obligation. By this reasoning, apparently, waiver might be permitted in Louisiana.[61] In Quebec, the corresponding article of the Civil Code does not appear to permit the same interpretation.

Unless the defects complained of were themselves the cause, if the object of the sale is no longer capable of being returned because it no longer exists, as for instance if a house has burned down, the fact that the buyer cannot render up the thing which he purchased will be a bar to his action for redhibition.

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[55]Comment, "Warranty of Quality in Louisiana: Nature and Proof of the Implied-in-Law Warranty" (1948-49), 23 *Tulane Law Review* 96.
Comment, "Warranty of Quality in Louisiana: Extent of Recovery under the Implied-in-Law Warranty" (1948-49), 23 *Tulane Law Review* 130.

[56]Comment, "Warranty of Quality in Louisiana: Limitations and Bars to the Vendee's Recovery in the Action of Redhibition" (1948-49), 23 *Tulane Law Review* 119.

[57]*Id.* and Marler, § 534; also art. 1524 of Quebec C.C.

[58]Marler, § 534.

[59]Article 2130 of the Louisiana Code and article 1138 of the Quebec Code set out the ways in which obligations may be extinguished.

[60]See the Comment *cit. supra*, note 55.

[61]*Id.*

Finally, there is the matter of prescription or limitation of action. In Quebec, article 1530 requires that the action be brought with reasonable diligence according to the nature of the defect. This puts the matter entirely at the discretion of the court. Marler has claimed:[62] "With immovables, it seems reasonable that the delay should not commence earlier than the discovery of the defect, provided the defect is one which, of its nature, must have existed at the time of the sale. How can the action be taken before knowledge of the defect?" Thus, it seems that no time limit but reasonableness operates until the defect is discovered, and after that due diligence must be employed in prosecuting the action.

In Louisiana, when the vendor was ignorant of the existence of the vice, the action must be brought within one year of the sale. If the vendor knew of the defect, the action must be brought within one year of the discovery of the defect. If the plaintiff alleges fraud on the part of the vendor, however, the ten-year period applicable to fraud applies.[63]

The effect of these provisions of the civil law which have been set out above is to put purchasers into a very much better position than their common law counterparts. This protection cannot, for our purposes, be better summarized than it is by a statement of Batshaw, J. in his judgment in the Quebec case of *Tellier* v. *Proulx*:[64]

> "The buyer of a new house is entitled to assume it was built with reasonably good and adequate materials, and with due compliance with the building art, without being obliged to resort to detailed tests or technical computations to verify this to be the case."

(*b*) *Action Against Builders where Buildings Perish in Whole or in Part*

In Louisiana the courts have held that all problems of warranty of quality are problems in redhibition. The purchaser's remedy for a defect in quality is the redhibitory action.[65] This may not wholly be true, however in Quebec. In Section IV of the Civil Code of Quebec, entitled "Of Work by Estimate and Contract", is to be found article 1688:

> "If a building perish in whole or in part within five years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss."

The view has been put forward by some authors that this article provides a remedy available to purchasers of new houses which are seriously damaged by structural defects. The term "perish" appears to apply to defects affecting the safety and solidity of the building: *e.g.* defective foundations or walls. A good deal of the case-law, however,

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[62]Marler, § 536.
[63]Articles 2534, 2546, and 2221 of the Louisiana Code and the Comments cited in note 54.
[64][1954] S.C. 180, at page 182.
[65]Comment, "Warranty of Quality in Louisiana: Express and Implied-in-fact Warranties" (1948-49), 23 *Tulane Law Review* 83.

and at least two prominent texts appear to be contrary to this proposition.[66] In *Cohen and Company Inc.* v. *Industries Brandon Limitée* Deslauriers, J. remarked as follows:[67]

> "Mignault et Faribault s'accordent pour dire que l'art. 1688 C.C. ne s'applique pas à un entrepreneur qui construit pour lui-meme sur son propre terrain un immeuble vendu ensuite à un tiers. Le recours de l'acheteur n'est que l'action rédhibitoire ou estimatoire contre le vendeur à raison des vices cachés, prévue à l'art. 1530 C.C.
>
> "Les cas cités par l'avocat de la demanderesse diffèrent sensiblement, sous cet important aspect, du cas qui nous occupe et ne trouvent pas ici leur application. Dans ces cas, le constructeur n'était pas le vendeur lui-meme."

which being translated into English renders:

> "Mignault and Faribault agree in saying that Article 1688 C.C. does not apply to a speculative builder who constructs for himself on his own land a building which is subsequently sold to a third party. The purchaser's only recourse is the redhibitory or estimatory action against the vendor by reason of latent defects as per article 1530 C.C.
>
> "The cases cited by the plaintiff's lawyer differ appreciably under this important aspect, from the present case and cannot be applied here as in those cases the builder was not the vendor himself."

It is fairly clear that article 1688 applies in two situations. That where the owner of land employs a builder to erect a house for him and the house subsequently collapses or otherwise becomes unusuable; and that where a builder has built a house for one who subsequently sells it. If the house then collapses the subsequent purchaser has an action against the builder by reason of the principle, stated in some cases, that the obligation under article 1688 attaches to the immovable and is transferred with it. The question which has arisen is whether one who purchases from an owner-builder is in the same position with respect to that builder as one who purchases from a person who contracted with a builder to erect a house.

At least two commentators would extend article 1688 to provide an action for purchasers from owner-builders: W. S. Johnson, Q.C., in his book, *The Joint and Several Responsibility of Architects, Engineers and Builders* (1955), and S. W. Weber, Q.C., in "The Liability of a Builder to a Purchaser or Subsequent Acquirer under Article 1688 C.C." (1960), 20 *R. du B.* 526. There is also support for this proposition, it is claimed, in the case-law.[68] Mr. Johnson examines the problem at some length in his book, and by historical and semantic arguments as well as by close

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[66]Faribault, *Traité de Droit Civil du Quebec*, Vol. 12 (1951), at page 442.
Mignault, *Droit Civil Canadien*, Vol. 7 (1906), p. 411.
Williams v. *Gilbert*, [1967] S.C. 458.
Cohen & Co. Inc. v. *Industries Brandon Limitée*, [1959] S.C. 63.
Kwiat v. *Beauchemin*, [1958] S.C. 322.

[67][1959] S.C. 63, at page 70.

[68]*Gagnon* v. *Latouche*, [1963] S.C. 417.
Stillwell-Bierce and Smith-Vale Co. v. *Lyall* (1912), 3 D.L.R. 369.
McGuire v. *Fraser* (1908), 40 S.C.R. 577 affirming (1908), 17 K.B. 449 (1908), 14 R.L. 172.

legal analysis he arrives at the conclusion that article 1688 does apply to owner-builders who build for sale to the public as well as to mere contractors building upon the land of another. Unfortunately, the courts appear neither uniformly nor overwhelmingly to have adopted this view. In view of this difference of authority it would seem wise for purchasers to resort to the redhibitory action under article 1522 instead of the action arising from article 1688.

The problem has not arisen in France and Louisiana since the working of their codes restricts the application of the principle to *louage d'ouvrage*, the hiring of services, or the pure contractor situation. In any event, the action under article 1688 does not appear as attractive as that under article 1522. Redhibitory defects include those liable to make the building "perish" and a host of others more minor. The redhibitory action, moreover, would appear easier to bring where the damage has not yet manifested itself in its full force. There might perhaps be some advantage regarding limitation of actions attaching to action under article 1688. It is possible that a plaintiff would still be able to sue under article 1688, which carries a five-year period, after a time which would give rise to a presumption of undue delay in an action for redhibition. This interpretation, however, seems unlikely.

The only other advantage which an action under article 1688 would appear to give is that it would allow subsequent purchasers to ignore their immediate vendor and reach directly to the builder within the five-year period. Such a procedure, although it may be available in a redhibitory action in Louisiana if the provisions governing warranty against eviction can apply by analogy to the warranty against latent defects, is probably not available in Quebec to allow the redhibitory action to be brought other than against the plaintiff's immediate vendor.

3. *The United States — Common Law Jurisdictions*

Until the decade beginning in 1930 the law governing builders' and vendors' liability for defects in quality was the same in the United States as the law in England. *Caveat emptor* was the fundamental rule in house sales. In 1931 and 1937 the English cases of *Miller* v. *Cannon Hill Estates Ltd.* and *Perry* v. *Sharon Development Co. Ltd.* partially altered the English law by finding implied warranties of fitness for habitation and workmanlike construction in the sale of unfinished houses.[69] This modification of the doctrine was not adopted in the United States until the Ohio case of *Vandershrier* v. *Aaron*[70] in 1957. The Ohio court, finding "but few cases bearing on the question", adopted the reasoning of the English cases and ruled that on the sale of an uncompleted house "there is an implied warranty that the house will be finished in a workmanlike manner."[71] The courts of Washington,[72] Colorado,[73] and Oklahoma[74] all came to the same conclusion in succeeding years.

[69][1931] 2. K.B. 113; [1937] 4 All E.R. 390 (C.A.).
[70](1957), 103 Ohio App. 340, 140 N.E. 2d 819.
[71]*Id.*, at pages 341-42 Ohio App., and page 821 N.E. 2d.
[72]*Hoye* v. *Century Builders, Inc.* (1958), 52 Wash. 2d 830, 329 P. 2d 474.
[73]*Glisan* v. *Smolenske* (1963), 153 Colo. 274, 387 P. 2d 260.
[74]*Jones* v. *Gatewood* (1963), 381 P. 2d 158.

In 1964 the Supreme Court of Colorado went even further. In the case of *Carpenter* v. *Donohoe*[75] a purchaser had moved into and was living in a new and completed house when the cellar wall caved in. His home was left supported precariously by emergency shoring. The cause of the collapse was traced to the builder's defective construction of the wall in a manner contrary to the local building code. In the face of this situation the Supreme Court seems to have had little difficulty in finding that the implied warranty doctrine extended to cover the sale of a completed home. In so doing the court pointed out that were the rule otherwise, the result would be incongruity. The *ratio* of the case was stated in the following terms:[76]

> "We hold that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation."

This appears to be the extent of the settled law in the United States. Thus far, no state has succeeded in putting the matter to rest by legislative action.

For the past two years the Law Revision Commission of the State of New York has attempted unsuccessfully to obtain the enactment of an amendment to the Real Property Law.[77] The proposed amendment would create a new Article 14 to the Real Property Law which would affect the liability of "housing merchants" for personal injuries and breach of warranty. Although it is not clear how far the common law in New York has progressed from the strict doctrine of *caveat emptor*[78] the Law Revision Commission would not leave the matter any longer for judicial development alone.

Section 462 of the proposed Article 14[79] would have the following effect:[80]

> "The proposed bill provides for the creation of express warranties in language similar to that used in section 2-313 of the Uniform Commercial Code. (§ 462 (1)) Warranties of freedom from faulty materials, construction according to sound engineering standards, construction in a workmanlike manner, and fitness for habitation are implied in every sale, but they do not apply to any condition

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[75](1964), 154 Colo. 78, 388 P. 2d 399.
[76]*Id.*, at pages 83-84 Colo., and page 402 P. 2d.
[77]*McKinney's Consolidated Laws of New York Annotated*, Book 49, Real Property Law.
[78]See and compare the cases of *Lutz* v. *Bayberry Huntington, Inc.* (1956), 148 N.Y.S. 2d 762, and *Eastman* v. *Britton* (1916), 162 N.Y.S. 587.
[79]Reproduced in an annex to this report.
[80]*Report and Recommendations of Law Revision Commission for 1968*, 1968 Leg. Doc. No. 65, Jan. 31, 1968. See *McKinney's Session Law News*, 1968, No. 1, March 25, 1968, at page A-35 *et seq.* The passage quoted is found on page A-37 of McKinney.

that an inspection of the premises would have revealed to a reasonably diligent purchaser at the time the contract was signed. (§ 462 (2)) Neither express nor implied warranties may be excluded or modified, with one exception in each case. At any time after execution of the contract of sale, an express warranty may be excluded or modified by a written instrument, signed by the purchaser, which sets forth in detail the warranty involved, the consent of the purchaser and the terms of the new agreement with respect thereto. (§ 462 (3)) An implied warranty may be excluded or modified in the same manner if the contract of sale pertains to a dwelling then completed. (§ 462 (4)) For the breach of any of the warranties provided for, the court may award legal or equitable relief, or both, as justice may require. (§ 462 (5)) Implied warranties extend to subsequent purchasers to whom a reasonably diligent inspection of the premises would not have revealed the breach of such warranty and who did not discover it before delivery of the deed to them. (§ 462 (6)) In the case of a dwelling completed at the time of the delivery of the deed to the purchaser, an action for breach of warranty must be commenced within three years after such delivery or after the taking of possession by the purchaser, whichever occurs first. (§ 462 (7) (a)) If a dwelling is not completed at the time of delivery of the deed, the three-year period runs from the date of completion of the dwelling or the taking of possession by the purchaser, whichever occurs first. (§ 462 (7) (b))"

The proposed subsection 8 of the new section 462 of Article 14 would require vendors to provide purchasers of new dwellings with security by way of bond, in an amount at least equal to the sale price of the dwelling, against the failure of such vendor to satisfy any liability for breach of warranty under the section. Regardless of any agreement to the contrary, failure of a vendor to provide his purchaser with the security would result in the vendor being unable to obtain specific performance of the contract of sale.

It is not now known whether it is likely that the New York legislature will see fit to enact the new law in the near future.

4. *The United States and Canada — Fiscal Quality Control at the Federal Level*

In the United States in 1952 the federal government organized the Subcommittee on Housing of the House Committee on Banking and Currency.[81] This subcommittee was set up for the purpose of investigating reports of shoddily constructed Federal Housing Administration and Veterans Administration homes. As a result of its hearings the subcommittee found that the reports of jerry-building and sharp and dishonest practices were largely true. As one commentator has observed:[82]

[81]See the excellent note on this subcommittee's work in Bearman, "Caveat Emptor in Sales of Realty — Recent Assaults upon the Rule" (1961), 14 *Vanderbilt Law Review* 541, at pages 550 *et seq.*

[82]*Id.*, at page 550.

> "The report of the committee's hearing and its final report and recommendations contain an almost unending collection of complaints by home buyers who, ignorant of the law or unable to obtain a bargaining position sufficient to demand an express warranty from their builder-vendor, were left without relief of any kind from the burdens of a poorly constructed house upon which they were paying heavy mortgages."

The legislation under which the F.H.A. and V.A. operated at that time authorized inspections by government officers of homes, the mortgages on which were being guaranteed by these departments. It also laid down minimum construction requirements.[83] Many members of the public believed that this in effect was some sort of guarantee of quality or that it represented an undertaking by the government to stand behind the houses in some way. In law, of course, this was not so. The legislation merely set out the minimum requirements qualifying a home for a government guaranteed mortgage.

The final report of the subcommittee contained the following terse description of the misunderstanding and its results:[84]

> "The subcommittee found a frequent belief among home owners that their homes were insured or guaranteed against defects by the Government. Studied attention to their legal rights and obligations was not given — this despite the fact that the purchase of a home represents the largest single investment they would probably make in their lifetime. . . . The purchasers of homes generally bought through purchase contracts which did not contain or incorporate by reference plans and specifications which would in any way protect the buyers. On the basis of these contracts, they rarely had any legal basis for suit against the builders."

The recommendation which the subcommittee proposed to remedy the situation was that the F.H.A. and V.A. adopt a standard construction contract containing guarantees of structural soundness and conformity to the plans on which the loan guarantee was based.

It was not, however, until 1954 that Congress made any move to act on these findings. By the *Housing Act* of 1954 a section, now to be found until Title 12 of the United States Code,[85] was enacted which states, in part, as follows:[86]

> "The Federal Housing Commissioner is authorized and directed to require that in connection with any [residential] property . . . approved for mortgage insurance . . . the seller or builder . . . shall deliver to the purchaser . . . a warranty that the dwelling is con-

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[83](1934), 48 Stat. 1248.

[84]*Final Report from the Subcommittee on Housing of the House Committee on Banking and Currency* (1952), 82 Cong., 2d Sess., at page 37. Cited in Bearman, *cit. supra*, note 81, at page 550.

[85](1964), 12 U.S. Code § 1701 j, no amendments to date.

[86]*Id.*, § 1701 j (a). See also (1964), 38 U.S. Code § 1805 (a) which is similar. Title 38 deals with veterans affairs.

> structed in substantial conformity with the plans and specifications . . . on which the Federal Housing Commissioner based his valuation of the dwelling. . . ."

Unfortunately, as appears from the language of the section, the warranty only requires mechanical adherence to the plans and specifications. A structure can quite possibly adhere to the strict letter of plans and specifications and still be subject to defects of workmanship.

A clause in the Senate report of the bill which led to the *Housing Act* of 1954 is instructive:[87]

> "The language of the House bill requiring a "warranty" was changed to "certification" in order to avoid any possibility of misleading prospective purchasers as to the protection extended by this section. Your committee felt that the word "warranty" carried with it the connotation of a blanket guaranty against all structural defects, poor materials, and poor workmanship. The word "certification" more clearly indicates that the purchaser is only safeguarded against non-conformity with the plans and specifications."

Although this attempt at changing the language of the bill was unsuccessful, its significance is clear.

In addition, it seems that the new section is not self-executing. The rights created under it are subject to local state law. Thus, in one case[88] it was held that the Administration was not authorized to enforce the warranty, but only to require it. Failure to honour the requirement could lead to a criminal sanction, but not, it seems, to an effective civil action. Any protection afforded to purchasers under this type of legislation is little more than illusory.[89]

In Canada, the Central Mortgage and Housing Corporation performs functions similar to those of the F.H.A. and V.A. in the United States. If a mortgage loan is to be financed under the provisions of the *National Housing Act, 1954*[90] the project to which the loan fund is being applied will be visited by inspectors from the C.M.H.C. Inspection is begun at the same time as the foundations are laid and continues at intervals until construction is finished. A house will be visited no less than three times, and frequently more often, by the inspectors.

The inspections which the C.M.H.C. makes are directed to ensuring "reasonable conformity with the approved plans, specifications and the standards of construction acceptable" to the Corporation. "The inspections do not constitute full architectural supervision. If the borrower desires such supervision, he makes private arrangements for it."[91]

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[87]Senate Report No. 1472, Housing Act of 1954, Report from the Committee on Banking and Currency, (1954), 83d Cong., 2d Sess., at page 47.

[88]*Ames* v. *Chestnut Knolls, Inc.* (1958), 159 F. Supp. 791. The case arose over the Veterans Administration version of the section which is identical in effect to that of the FHA.

[89]Bearman, *cit. supra*, note 81, at pages 552-53.

[90]S.C. 1954, c. 23.

[91]H. Woodard, *Canadian Mortgages* (1959), at pages 317-18. Mr. Woodard has held senior positions with the C.M.H.C. and his book was sponsored by the Corporation.

The ultimate object of these inspections, of course, is simply the protection of the security interest being insured. We would, however, be remiss if we failed to acknowledge that C.M.H.C. watchfulness has indeed had a beneficial effect on the quality of Canadian housing. The Corporation's concern with the quality of construction and design is well known and we must applaud the dedication of its officers and employees. Some of the same objections, however, as may be raised against the F.H.A. scheme can be raised here.

In a booklet entitled *N.H.A.: what you should know about the Inspection of Your House*[92] the C.M.H.C. makes these observations:

> "During the construction of a house financed under the National Housing Act by an approved lender or by the Federal housing agency — Central Mortgage and Housing Corporation — the Corporation does at least three inspections. These inspections are made to ensure that the work is in reasonable conformity with the housing standards prescribed under the Act and with the plans and specifications submitted by the borrower and approved by C.M.H.C. Inspections are not designed to police builders or to provide construction supervision. The primary purpose is to make sure the completed house will be adequate security for the N.H.A. mortgage loan."

and:

> "Arrangements with the builder and fulfilment of the contract or agreement are the sole responsibility of the purchaser who should understand fully what is included in the purchase price. The wise purchaser will also arrange his own inspections since C.M.H.C.'s inspections only indirectly benefit the purchaser."

A purchaser of a home that has been inspected by the C.M.H.C. is not necessarily assured of any standard of quality in a legal sense. In its published literature the Corporation is at pains to warn purchasers that their legal protection against construction defects is in their own hands. Except as he may obtain rights by contract, a purchaser has standing neither to enforce quality requirements laid upon a builder by C.M.H.C. nor to demand redress should a builder fail to live up to those requirements. A builder may, moreover, have satisfied ostensibly the Corporation's requirements and still have built defects into the home. Finally, it must be remembered that not all residential housing in Ontario is subject to C.M.H.C. inspection, a substantial segment of it being built and financed outside of the N.H.A. scheme. In Ontario in 1967, approximately 52 per cent of housing starts of all types did not receive financial assistance under the *National Housing Act*. These units therefore were not subject to C.M.H.C. inspection.

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[92]N.H.A. 1234 3/67.

5. *Analysis*

(*a*) *The United Kingdom*

In the United Kingdom the N.H.B.R.C. has set up a most comprehensive scheme for industry-wide quality control. They have in addition infused their scheme with legal safeguards sufficient for even the most wary purchaser. These safeguards, coupled with the supervision of the Council and its application of insurance purchased on a group basis to defects which slip through the inspection service, mean that for six guineas (about seventeen dollars) the purchaser of a home from a registered house-builder can be assured that he is as well protected as he can fairly expect.

Would such a scheme work in Ontario? One of the reasons it works in England is that since 1966 the government has made it clear that unless the voluntary scheme is made to work more stringent measures including perhaps compulsory government registration of builders, will be imposed. Mere force of economics, it seems, did not operate to bring the vast majority of British builders into the scheme as the founders of the N.H.B.R.C. had hoped. Indeed, fully 48 per cent of those builders now registered were not registered before 1966. In Ontario, with a building industry far less amenable to organization than that in the United Kingdom, and with a completely free enterprise system working very profitably for the builders, the problems of obtaining voluntary registration of a significant portion of the industry would be far greater. Some measure of government compulsion would be essential.

There are further drawbacks. No body analogous to the N.H.B.R.C. exists in Ontario. Very few people outside of the building industry in our province have the knowledge and expertise required to make a go of such an organization started from scratch. Yet, there is logic to the demand of the British government that industry representation on the registration council must be in the minority if the needs of the consumer are to be served.

Then, too, the complete scheme which we have discussed was not put into operation in Britain overnight. The N.H.B.R.C. has been in existence since 1936. It was not until 1966 that it came into its own, despite the praise that was periodically given to it during those thirty years. The Council thus has had more than a quarter of a century to develop techniques and procedures, and to earn the trust and co-operation of those dealing with it.

Apart from such considerations, a good deal of money would need to be spent in order to establish a council for Ontario. In the U.K. this money was contributed by the building industry and other private supporters of the N.H.B.R.C. idea over the life of the Council. It is unlikely that such money would be available from private sources in Ontario in the sums which probably would be required. To overcome this difficulty a considerable amount of public money would be needed to get things started.

Despite these difficulties, however, the scheme does have some very attractive features. Foremost, it is precautionary, not remedial. The prime objective of the scheme is to prevent major defects from appearing and to minimize the minor ones. Nobody believes that a product constructed outside, exposed to the elements, by a crew of twenty or more artisans can always be perfect in every detail. The registration scheme operating in Britian, however, appears to have come about as close as possible to making sure that the purchaser gets the best for his money in the first instance, and the fastest and cheapest remedy for defects when they do appear. Schemes based upon warranties implied by law, statutory obligations, or liability for negligence are all flawed to some extent by the fact that they wait for some defect to appear and then give the householder an action at law which it may or may not be to his advantage to pursue. Even if he does pursue it, and even if he wins his case, he may yet find that his judgment debtor is penniless, or has gone bankrupt, or is otherwise judgment-proof. This is not so under the N.H.B.R.C. scheme. At the very best these other approaches rely on the preventive effect of a lawsuit: a negative rather than a positive approach to quality control.

Ultimately, of course, the question becomes: How far do we wish to go to protect house purchasers? Is it desired to establish a scheme at public expense which will give them many of the benefits (such as low-cost insurance and inspection services) of an organized group? That would be the effect of adopting the N.H.B.R.C. approach. Purchasers would get the benefits of organization without themselves being organized.

As an alternative to an N.H.B.R.C.-type scheme we could give purchasers a better remedy if they have purchased a defective house by giving them a cause of action based on an implied warranty or a statutory obligation. Such a scheme would have to avoid the problems of waiver, contracting out, increased prices, and the reluctance of the average man to become embroiled in a lawsuit if the damage he has suffered is of border-line seriousness.

(*b*) *The Civil Law*

The civil law approach to the problem of the sale of houses and defects in construction is characterized by a remarkably enlightened application of the implied warranty concept. Civilians seem to have no difficulty in assimilating sales of movables and immovables and requiring that in both instances vendors must act in the most consummate good faith. *Caveat emptor* has never been a part of the civil law.

So long as he has subjected his prospective purchase to an ordinary inspection a purchaser of a new house can assume that it is reasonably constructed of proper materials and will be fit for habitation. If it is not, he can force his vendor to take it back and return the price, or he can claim damages by way of the *quanti minoris* action. It appears very difficult for vendors to contract out of liability under the redhibitory action.

The implied warranty which forms the basis of the redhibitory action suffers, of course, from the ills of all such measures. Unlike schemes such as that run by N.H.B.R.C. in the United Kingdom, actions on implied warranties do very little actively to prevent the defects, the effects of which they are designed to cure. In fairness, however, it must be said that, registration schemes notwithstanding, the redhibitory action is superior to its common law counterpart.

The implied warranty of quality in the civil law applies regardless of whether the house is to be built, is being built or is finished. It is very difficult for a vendor to contract out of his obligation. On proof of the defect the buyer is entitled either to a return of the price paid or to some diminution of the price by way of damages.

The principal drawback of the action is that it is only available if the defects are relatively major. They must affect the usefulness of the house so seriously that had he known of them the buyer would not have purchased the house or would not have paid so much money for it. The result is that there are many minor defects which can be extremely irritating but which will not give rise to a worthwhile action.

The action moreover, is against the vendor of the house, not the builder. By the time a defect shows up, the vendor may not be reachable. Some combination of redhibition and the action offered by article 1688 of the Quebec Code would give a better remedy in such a situation.

Nevertheless, the civil law approach gives purchasers almost the maximum of protection which it is possible to give merely by means of a right of action raised by the breach of a duty created by implication of law. It is therefore an instructive model.

(*c*) *The United States and Canada*

The proposed New York legislation represents an excellent example of legislative establishment of implied-in-law warranties. It has also the advantages of restrictions on contracting-out and the requirement of security against builder bankruptcy. We have found the proposed bill, and the report and working paper of the Law Revision Commission pertinent to it, most informative.

The United States federal legislation governing the Federal Housing Administration and Veterans Administration is interesting not for the manner of its execution but for the principle hidden behind it. It represents an example of how building practices and contractual warranties might be controlled by institutional lenders or government agencies which provide, control, or guarantee mortgages. Its chief drawback lies in the fact that it gives the purchasing public a protection which is indirect only. The quality of the houses under the scheme will be no better than the standards demanded by the Administration. The Administration is naturally more concerned with the value of the security interest than with true quality control and purchaser protection. Even if houses fall below the prescribed standard, purchasers must rely on the Administration to take action. They have themselves

no power to act effectively. In any event, any action taken will probably not inure to the benefit of a purchaser. It will be punitive and not remedial.

In Canada, the Central Mortgage and Housing Corporation offers no better legal protection to purchasers than does its United States counterpart. The protection given is similarly indirect and the purchaser likewise unable to obtain redress for a breach of standards requirements.

V The Six Basic Approaches

It is apparent from the study that we have undertaken that there are six basic approaches to the rectification of the problem of *caveat emptor* in new house sales. These are:

1. Registration of Builders,
2. Inspection during Construction,
3. Insurance,
4. Quality Control by Mortgagees or Guarantors,
5. Warranties Implied by Law, and
6. Obligations Imposed by Statute.

The N.H.B.R.C. scheme employs approaches 1, 2, 3 and 5. The civil law employs approaches 5 and 6. The proposed New York statute employs approach 5 and a form of approach 3. The United States Federal Housing Administration and Veterans Administration programmes and the Canadian *National Housing Act* programme administered by the Central Mortgage and Housing Corporation employ approach number 4. The following section of our report offers a brief criticism of these approaches.

Registration of Builders. The Commission does not believe that a registration scheme would be the correct way to attack the problem in Ontario at the present time. We prefer that the degree of licensing and registration of businesses in the province not be increased if other methods of reform can be found which will suffice. As has been stated in the Report of the Royal Commission Inquiry into Civil Rights:[93]

> ". . . the interest of the individual and the public interest may suffer if licensing requirements are unnecessarily imposed or unreasonable standards are required in their implementation. Generally, there is still basic truth expressed in the judgment of Harrison, C.J. in *Regina* v. *Johnston*:
>
> > 'the great law governing the conduct of man in serving his fellowmen is the law of competition. The less that law is interfered with the better for the general interest of society.' "

We believe this to be a case where such principles should be applied.

[93]Royal Commission Inquiry into Civil Rights, Report Number One, Vol. 3, at pages 1096-97.

If this were not enough, a registration scheme would have a number of practical drawbacks affecting its advisability. For instance, as a result of the number of builders, the amount of new house construction, and the sheer size of our province the inspectorate, which would be required to make a registration scheme work, would have to be very large.

Then, too, the registrar or the body charged with the duty to register builders, discipline them, and in proper cases suspend or revoke their registration, would be fixed with an enormous and highly contentious task. The programme which would probably have to be undertaken would involve first, the registration of any and all applicants, and then, a systematic weeding out of those builders who did not keep up to whatever standards were required. The result of this would probably be a good many appeals from the registrar's decisions with consequent additional expenditure of public and private money. At this stage, such a drastic solution does not recommend itself.

Inspection during Construction. This matter is really inseparable from the question of registration. The practical objections made in dealing with that matter are applicable here.

Insurance. The Commission recognizes the contribution which the insurance provisions of the N.H.B.R.C. scheme make to the protection of house purchasers in Britain. Since, however, we are unable to recommend the adoption of an N.H.B.R.C. type scheme in Ontario we are also unable to recommend the establishment of a similar insurance scheme.

In addition, we do not propose to recommend the requirement that builders put up some form of security against bankruptcy as would be necessitated by the proposed legislation in New York. We expect, however, that builders in the province will see fit to insure themselves against the possible consequences of any liability which our recommendations would impose on them.

Quality Control by Mortgagees or Guarantors. There are two reasons why we do not believe that this approach is appropriate for adoption. First, the number of homes which would be affected by provincial legislation or regulation in this field, would not by any means be far-reaching enough to have the corrective effect which we desire. Second, even if our first reason were not a difficulty the same problems would arise as regards inspection as have already been mentioned. It would be difficult and expensive to establish and operate the detailed inspection programme which effective quality control by this means would demand.

The present C.M.H.C. inspection and standards programme does not appear comprehensive enough at present to nullify the legal problems which we have found.

Warranties Implied by Law. We are opposed to the use of implied warranties as a means of settling this problem. As we have seen in our discussion of the present law, warranties implied by law are much too easy to avoid or modify. Some degree of restriction on contracting out of the implied warranties would be necessary.

In any event, the use of implied contractual terms does not appear as a suitable approach to the problem. As a matter of principle we do not believe that the solution lies in the area of contract law at all. It is our contention that builders, like many others in our society, have duties of a general nature to the public. These general duties consist of the responsibility to provide new homes which are as sound and as free from defects as the builder's art can make them.

We would, however, make two exceptions to our objection to the use of implied contractual terms, one in the case of sales by means of model units and the other in the case of sales by description. It is observed that it is common practice for homes in subdivisions to be sold on the basis of model houses or by means of plans and sketches. Indeed, in the marketing of large developments or of condominium units this may be the only practicable technique. The result can be that although he may get a house or unit which is objectively sound and not unduly lacking in quality, the purchaser may end up with a home differing in some important respects from the one he chose. The heating or electrical outlets may, for instance, be placed differently from those in the model house. A degree or quality of insulation or other materials different from those in the model house may be installed in the purchaser's unit. Considerably more care may have been taken in the construction and finishing of the model units than the units finally sold. To help protect purchasers in such cases it would seem proper to enact provisions similar to sections 14 and 16 of *The Sale of Goods Act*.[94]

It must, however, be pointed out that the analogy between goods and houses in this respect is by no means complete. When *The Sale of Goods Act* refers to a "sale by sample" it is concerned with a sale of bulk goods effected after inspection of a small representative portion of that bulk. Our concern here is a sale, not by *sample* in the statistical or testing sense, but rather by *example*.

Thus, where there were a contract for the sale of a house by description (i.e., by means of drawings, plans, etc.) there would be an implied condition that the finished house will correspond with the description, and if the sale were by model unit (i.e., by model house) as well as by description, it would not be sufficient that the house correspond substantially with the model if it did not also correspond with the description. In the case of a contract for sale by model, there would be implied conditions that the completed house will correspond substantially with the model in quality and that the purchaser will be afforded a reasonable opportunity of comparing the finished house with the model. Any remedies afforded by these implied conditions would exist in addition to the remedies available for breaches of statutory obligations. Thus, in the case of a sale by model it would be no defence to a statutory claim for damages by reason of defective insulation to point out that the insulation of the model house was also defective.

Note that here the obligations stipulated are contractual and not statutory. It may often occur that the tastes or needs of the parties, or even physical differences in the lots on which the houses may be built,

[94]R.S.O. 1960, c. 358.

will call for variations from the strict plan and specifications of the model home. Such matters are best left for the vendor and purchaser to resolve between themselves. Therefore, it would be left to vendor and purchaser to exclude these terms if they saw fit. Sufficient protection for the purchaser against defective construction would be provided by the statutory obligations.

Note also, the characterization of these implied terms as "conditions" rather than "warranties". Breach of a warranty would only be accompanied by a right to obtain damages. Breach of a condition would allow the purchaser either to claim damages if the sale was completed or to repudiate the contract of sale and refuse to pay the price if the agreement to purchase was still executory. If money had already passed, he could recover it.

Obligations Imposed by Statute. As a result of our deliberations we have decided to recommend a scheme, to be embodied in a statute, declaring and defining the obligation or duty which we believe devolves upon those offering new houses for sale to the public. Breach of this duty would give rise to an action for damages founded upon the statute. Any contract between builder or vendor and the purchaser would be irrelevant to this action. It would be made explicitly impossible to waive one's rights or another's duties under the statute except where the purchaser is made fully aware of the defects in writing and accepts them as part of the bargain. The defects should be specified and general words of exculpation should not be permitted.

By this method purchasers of new housing would be given protection against irresponsible, careless and unwise builders. Indirectly, merely by its existence, the recommended scheme would be an instrument for raising and maintaining the standard of quality of new houses in the province.

The statute should apply to the trade sale of new homes, creating joint and several obligations on the part of builders and vendors to the effect that such homes are:

(*a*) fit for habitation,

(*b*) built of proper materials in a good and workmanlike manner, and

(*c*) free from latent defects of construction.

The obligations would arise on the sale of completed, uncompleted, or yet to be erected homes. A builder or vendor who failed in his statutory duty would be liable in damages to the purchaser and his successors in title.

These obligations and the rights consequent upon them would not displace any rights to damages or rescission already available to purchasers. Double recovery would not be permitted. Purchasers would not be able to obtain both damages under the statute for repairing and restoring the premises and also rescission.

Not only the initial purchaser of a new house but also his successors in title should be able to rely on the statutory obligations. One limitation period should govern. This period should run from the date possession was taken under the initial sale. The reason for according successors in title the same rights as the initial purchaser subject to the limitation period is that the obligation devolving upon builders and vendors of new housing is independent of any contractual relation. The obligation is one that must exist in favour of all owners of a house within the limitation period. The rights of subsequent purchasers as among themselves would not be disturbed in any way by the scheme.

No one should be able to exempt himself from the operation of the statute other than by way of a strictly defined formula. Purchasers must be given protection which cannot be set aside by the skilful drafting of contractual terms. We recognize that there will be situations where all the parties to a trade sale will not wish to be bound by the statute. For instance, if the purchaser is fully aware of the defects which he is accepting and is able to bargain for a lower price; or if he is willing to take an uncompleted house and finish it himself; or if he wishes to specify materials or fittings of his own choosing, his vendor should not be bound by the statute. The statutory obligations, however, should be displaced only in the case of defects listed and explicitly described in the contract.

As we have pointed out, we also recommend the inclusion in the statute of sections similar in wording to sections 14 and 16 of *The Sale of Goods Act*. If the contract of sale is still executory the breach of the conditions implied by these sections would entitle the purchaser to repudiate the contract and demand the return of any money advanced, or to affirm the contract and demand a diminution of the price. If the contract is an executed one it would be open to the purchaser to institute an action for damages only.

Of considerable importance to the scheme is the resolution of the question of what limitation period should be applied to the causes of action which may arise under it. Actions on breaches of the implied conditions just mentioned would, of course, be governed by the normal period of limitations applicable to causes arising out of contract. This period is six years.

In light of the fact that evidence of many important defects in construction may not appear for several years after the house is first occupied, and in order that rights given under the statute will not be out of line with similar rights which may arise out of a contract, the limitation period applicable to the cause of action based on a breach of the duty set out in the statute should be six years. This period should run from the date on which the initial purchaser takes possession of the house.

Terms used in the statute should be defined. The term "new house" should be so defined as to include any residential structure already completed, still under construction, or yet to be built which was not occupied as a residence prior to its trade sale. This definition, however,

which is designed to place only "new" and not "used" housing under the act, should be framed broadly enough to include any structure, part of a structure, flat, apartment, or other dwelling unit substantially reconditioned or rebuilt for the purpose of resale.

The term "purchaser" should be defined to mean the purchaser under a trade sale from a builder or a vendor, and should include in its meaning successors in title to the initial purchaser within the running of the limitation period.

The term "builder" should be defined to mean any person engaged in the business of constructing houses on land which he owns or in which he has an interest, intended ultimately for sale to the public.

The term "trade sale" should be defined to mean any sale of a new house by a builder or a vendor. It should include agreements to lease with an option to buy, leases for periods longer than fifteen years, and any other agreement whereby exclusive possession for more than fifteen years is transferred to the purchaser. We think a period less than fifteen years would interfere with *bona fide* leasing transactions. The aim of this definition would be to avoid transactions, designed to evade the provisions of the statute, having the effect but not the form of a sale.

The terms "sale by description" and "sale by model" should be defined so as to mean respectively a sale where the purchaser buys on the basis of plans, drawings, or other descriptions offered to him by the builder or vendor, and a sale where the purchaser buys on the basis of a model or show house shown to him by the builder or vendor.

The term "vendor" should be defined to mean any person in the business of selling new houses to the public.

VI Recommendations

We recommend that the necessary legislation be enacted to provide that:

(1) A new house built or sold should be,

  (*a*) fit for habitation,

  (*b*) built of proper material and in a good and workmanlike manner, and

  (*c*) free from latent defects in construction;

(2) The obligations under this statute arise on the sale of completed or uncompleted houses, or houses yet to be built;

(3) Where there is a sale of a house by description there be an implied condition that the house will correspond with the description and if the sale is according to a model house as well as by description it be not sufficient that the house correspond substantially with the model house if it does not also correspond with the description;

(4) In case of a contract for sale by model there be an implied condition that the completed house will correspond substantially with the model in quality and the purchaser will be afforded a reasonable opportunity of comparing the finished house with the model;

(5) Recommendation Number One apply to the sale of a house by description or by model house;

(6) The parties be not allowed to contract out of the statute except by clear and unambiguous language setting out in the contract for sale the defects in the building;

(7) The builder and vendor who fails in his statutory duties or obligations imposed by the statute be liable in damages;

(8) In case the contract for sale is executory the purchaser have the right of rescission as an alternative to damages;

(9) The rights under the statute not affect any rights as to damages or rescission otherwise arising and available to the purchaser but be alternative thereto;

(10) The rights under the statute extend to successors in title to the purchaser;

(11) There be a limitation period of six years for any cause of action arising under the statute;

(12) The limitation period run from the date on which the purchaser takes possession;

(13) The following terms be defined as indicated:

(*a*) "New house" shall include any residential structure already completed, still under construction, or yet to be built which was not occupied as a residence prior to a trade sale; (This definition should be framed broadly enough to include any structure, part of a structure, flat, apartment, or other dwelling unit substantially reconditioned or rebuilt for the purpose of resale.)

(*b*) "Purchaser" shall mean the purchaser under a trade sale from a builder or a vendor, and shall include successors in title to the initial purchaser within the running of the limitation period;

(*c*) "Builder" shall mean any person engaged in the business of constructing houses on land which he owns or in which he has an interest, intended ultimately for sale to the public;

(*d*) "Trade sale" shall mean any sale of a new house by a builder or a vendor, including agreements to lease with

an option to buy, leases for periods longer than fifteen years, and any other agreement whereby exclusive possession for more than fifteen years is transferred to the purchaser; (The aim of this definition is to avoid transactions, designed to evade the provisions of the statute, having the effect but not the form of a sale.)

(*e*) "Sale by description" and "sale by model" shall mean respectively a sale where the purchaser buys on the basis of plans, drawings, or other descriptions offered to him by the builder or vendor, and a sale where the purchaser buys on the basis of a model house shown to him by the builder or vendor;

(*f*) "Vendor" shall mean any person who sells a new house to the public.

All of which is respectfully submitted,

H. ALLAN LEAL,
Chairman.

JAMES C. McRUER,
Commissioner.

RICHARD A. BELL,
Commissioner.

W. GIBSON GRAY,
Commissioner.

WILLIAM R. POOLE,
Commissioner.

October 4, 1968.

APPENDICES

APPENDIX A

National House-Builders Registration Council: Legal Agreement HB 5

AN AGREEMENT made the.....day of.....19....

BETWEEN.....

of.....

(hereinafter called "the Builder") of the one part and.....

of.....
(hereinafter called "the Purchaser") of the other part.

WHEREAS:

(1) The Builder is the builder or has arranged for the building of a dwelling (hereinafter called "the dwelling") known as..... which is to be built for the Purchaser or sold or leased to him complete under a contract dated.....

(2) This Agreement is supplemental to the said contract and is intended to ensure that the dwelling will be or has been erected and completed at least in accordance with certain minimum standards and to afford a guarantee and remedies to the Purchaser additional to any guarantee or remedies contained in the said contract.

NOW in consideration of the sum of one shilling paid by the Purchaser to the Builder (the receipt whereof the Builder hereby acknowledges) IT IS HEREBY AGREED as follows:

Definitions

1. In this Agreement the following expressions have the meanings hereby assigned to them respectively:

"The Purchaser" shall subject to the provisions of clause 7 hereof include his successors in title to the dwelling and mortgagees in possession.

"Initial guarantee period" means the period of two years from the date of the Certificate of the National House-Builders Registration Council (hereinafter called "the Council") or one year from the date of completion of the purchase of the dwelling by the first purchaser whichever ends the later.

"The Certificate" means the document issued by the Council certifying that a dwelling has been inspected periodically during construction and that so far as was seen the standards of workmanship and materials were substantially in conformity with the Council's Requirements.

"The Council's Requirements" means the requirements for the design and construction of dwellings adopted by the Council as approved by the Ministry of Housing and Local Government and by the Ministry of Public Building and Works and in force when the concreting of the foundations of the dwelling was begun.

"Dwelling" shall include any garage permanent outbuilding drive ways footpaths boundary walls retaining walls drainage pipes channels gullies and inspection chambers within the curtilage of the premises and belonging thereto and constructed under the provisions of the said contract but excluding fences and constructions of non-permanent materials. It shall include in relation to any maisonette or flat any common parts that are vested jointly or in common or in a corporation comprised exclusively of the Purchaser and other purchasers of maisonettes or flats within such premises.

The Builder's Obligations

2. The Builder hereby warrants:

(1) that his name is entered on the Register maintained by the Council;

(2) that he has undertaken to abide by the Conditions of Registration and Rules of the Council and that he has submitted an application for periodical inspection of the dwelling by the Council during construction.

3. The Builder hereby warrants that the dwelling has been built or agrees that it will be built:

(1) in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation and

(2) so as to comply in all respects with the Council's Requirements; and

(3) so as to qualify for the Certificate.

Provided that (i) if the Council's Requirements conflict with any drawings or specification contained or referred to in the said contract then to the extent that the Council's Requirements provide for a higher standard of construction or for additional work to be done the Council's Requirements shall prevail and (ii) the Builder shall during office hours show to the Purchaser upon his request a specimen of the Certificate and the Council's Conditions of Registration and Rules.

4. On receipt of the Certificate from the Council, or upon the signing of this Agreement whichever shall be the later, the Builder shall deliver the Certificate to the Purchaser.*

5. The Builder shall make good within a reasonable time after receipt of the Purchaser's report and at his own expense any defects in the dwelling which are consequent upon any breach by the Builder of the Council's Requirements and which are reported in writing to the Builder within the initial guarantee period. Nothing in this Agreement shall oblige the Builder to make good defects in the dwelling caused by wear and tear or by normal shrinkage arising from the drying out of the dampness normally to be expected in any dwelling after construction.

Provided that if a central heating system is included in the dwelling the Builder's undertaking contained in this clause shall so far as that system is concerned apply for only one year from the date of the Certificate or one year from the date of completion of the purchase of the dwelling by the first purchaser whichever ends the later.

The Purchaser's Obligation

6. The Purchaser shall report in writing to the Builder any defects in the dwelling which are consequent upon any breach by the Builder of the Council's Requirements as soon as possible after they appear.

7. Nothing in this Agreement shall confer any rights against either the Builder or the Council upon either any successor in title of the Purchaser or a mortgagee in possession in respect of any defect in the dwelling which has not but which should have been reported to the Builder or to the Council as the case may be under the terms of this Agreement before the date of the acquisition of such title or such possession.

General

8. (*a*) In consideration of the sum of one shilling paid by the Purchaser to the Builder for the account of the Council, the receipt whereof the Builder hereby acknowledges, the Builder under the authority vested in him by the Council by virtue of his registration in the said Register maintained by the Council hereby as agent and on behalf of the Council undertakes that the Council will perform the undertakings set out in the First Schedule hereto subject to the conditions therein provided and subject to compliance by the Purchaser with the terms and conditions set out in the Second Schedule hereto.

(*b*) Nothing in this clause shall be construed as relieving the Builder of any of his obligations to the Purchaser howsoever they may arise provided that the Purchaser shall before pursuing any claim against the Builder on account of any

defect in the dwelling appearing after the initial guarantee period in respect of which he may by virtue of this clause have any claim against the Council first pursue his remedy against the Council and any relief obtained from the Council shall be taken into account in mitigation of damages against the Builder.

9. If the dwelling comprises common parts as mentioned in clause 1 hereof no claim in respect of such common parts shall be entertained either by the Builder or the Council in relation to their respective obligations unless it is made by the Purchaser jointly with all other purchasers of flats or maisonettes within the premises. For the purposes of this clause a claim by a corporation such as is referred to in clause 1 hereof shall be deemed to be made by the Purchaser jointly with all such other purchasers.

10. The rights conferred on the Purchaser by the terms of this Agreement are in addition to any rights conferred on the Purchaser by any other contract between the Purchaser and the Builder.

11. Nothing contained in any other contract made between the Purchaser and the Builder relating to the dwelling shall restrict or override in any way whatsoever that which is contained in this Agreement and subject to proviso (i) to clause 3 hereof in so far as any term in any such other contract is inconsistent with the terms of this Agreement the terms of this Agreement shall prevail provided that a higher standard or additional requirements called for by the said contract shall not be deemed inconsistent.

Arbitration

12. If any dispute shall arise between the Purchaser and the Builder concerning any matter or thing arising hereunder or in connection herewith such dispute shall be and is hereby referred to the arbitration and final decision of an Arbitrator to be appointed at the request of either party by the Presidents of the Royal Institute of British Architects and of the Royal Institution of Chartered Surveyors from a panel of Arbitrators nominated by them and such reference shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1950 or any subsequent re-enactment or modification thereof. Without prejudice to the generality of his powers such Arbitrator shall have the same power to award damages for any breach of this Agreement as would a judge of the High Court of Justice.

Provided that if there shall be any other dispute or difference between the Purchaser and the Builder in any way connected with the contract to which this Agreement is supplemental and which the Builder does not agree to being referred to the arbitration of the same Arbitrator in the same reference as any dispute arising hereunder is referred the Purchaser shall not be obliged to refer any dispute arising hereunder to arbitration but may take such other proceedings in connection therewith as he may be advised.

IN WITNESS whereof the parties hereto have hereunto set their hands the day and year first above written.

The First and Second Schedules above referred to (see opposite).

SIGNED by the above-named Builder in the presence of

.....	.....	.....
of.....	.....	.....

Affix 6d. Stamp

SIGNED by the above-named Purchaser in the presence of

....

of.....

*Due to no fault on the part of the Builder there may be a delay of a few weeks between the completion of the dwelling and the issue of the Certificate.

THE FIRST SCHEDULE before referred to

The Council's undertakings under clause 8

(A) To indemnify any person who has paid a deposit to or exchanged contracts with a Registered House-Builder or Probationer or his agents for the building sale or lease of a dwelling intended for such person's own or family's occupation (up to a maximum of £750 in respect of any one dwelling) against any loss sustained or expense necessarily incurred arising directly from the bankruptcy or liquidation (whether compulsory or voluntary) or fraud of a Registered House-Builder or Probationer provided such loss or expense is due to the failure of the Registered House-Builder or Probationer to build such dwelling so as to comply in all respects with the Council's requirements.

(B) Where a Certificate has been issued:

(1) To honour any award made by an Arbitrator or any judgment of any Court obtained by the Purchaser against the Builder as a consequence of the failure of the Builder to make good defects in the dwelling notified in writing within two years from the date of the Certificate and consequent upon non-compliance with the Council's Requirements if for any reason the Builder shall fail to honour such award or judgment.

(2) To make good or defray the cost of making good any damage occasioned by any major defect in the structure of the dwelling and of remedying such defect in the dwelling consequent upon non-compliance with the Council's Requirements or subsidence or settlement of which written notice shall have been given to the Council as soon as possible after its appearance and in any event not later than the expiration of the tenth year from the date of the Certificate.

Provided that the Council shall not be liable under the terms of this sub-clause in respect of:

(*a*) any claim consequent upon

(i) negligence other than that of the Builder or his sub-contractor.

(ii) loss damage or liability insurable under a House-owner's Policy providing the same cover in respect of buildings as the Houseowner's Policy (Great Britain & Northern Ireland) at 2/6d. per centum issued by any member of the Sun Alliance and London Insurance Group.

(iii) subsidence for which compensation is provided by legislation.

(iv) defective design where the Purchaser shall have provided the structural or installation design details.

(*b*) the first £15 of each claim made after the end of the sixth year from the date of the Certificate.

(*c*) damage to anything not originally built into the dwelling pursuant to any contract between the Purchaser and the Builder.

(*d*) loss or damage caused by dampness or condensation due to normal drying out of the dwelling.

(*e*) loss or damage caused by wear and tear and gradual deterioration.

(*f*) defects which should reasonably have been reported during the period of two years from the date of the certificate.

(*g*) any claim payable under paragraph (1) of this clause.

Provided that the liability of the Council shall not exceed in respect of

	clause (A)	clause (B) (1)	clause (B) (2)
Any one dwelling	£750	£5,000	£2,500
Any one Registered House-Builder or Probationer for whom the number of dwellings certified during the period of 12 months prior to the date of claim has been			
(*a*) 0 to 99	£10,000	£100,000	£100,000
(*b*) 100 to 499	£50,000	£250,000	£250,000
(*c*) 500 and over	£100,000		

Should the total of claims under clause A, clause B (1) or clause B (2) made upon the Council by Purchasers in respect of any one Registered House-Builder or Probationer exceed the total liability of the Council in respect of that Registered House-Builder or Probationer under the relevant clause, the claim of each Purchaser may be reduced in proportion to the amount by which the total claims exceed the total liability.

In this Schedule the word "structure" means the whole of the permanent framework of the dwelling comprising the foundations the external and internal walls partitions piers chimney breasts and chimneys floors landings balconies and stairs roof but excluding service and mechanical installations fixtures and fittings and applied decorative materials and finishes.

THE SECOND SCHEDULE before referred to

The terms and conditions to be observed by the Purchaser under clause 8

(1) If the Purchaser suffers loss in the circumstances set out in clause (A) of the First Schedule hereto he shall as a condition of being indemnified by the Council (if so required) transfer his rights against the Builder to the Council's Insurance Company.

(2) (*a*) The Purchaser shall notify the Council in writing as soon as practicable after its appearance of any damage which the Council is liable to make good or defray the cost of making good under paragraph (2) of clause (B) of the First Schedule hereto.

(*b*) Before his claim is investigated the Purchaser shall pay to the Council an investigation fee which will be based on current professional charges. The Council will then arrange for an

investigation under the supervision of a Chartered Member of the Royal Institute of British Architects or of the Royal Institution of Chartered Surveyors or a member of any other appropriate professional institution who will if the claim is found valid in principle prepare a schedule of the work necessary to make good the damage. The Council will normally require the Purchaser to have the work carried out in accordance with such schedule and will pay the cost thereof as approved by its surveyor on the basis of a builder's estimate. The investigation fee will be refunded to the Purchaser if the claim is found to be valid.

(*c*) Even if a claim is found not to be valid the investigation fee may be refunded if in the opinion of the Council it was reasonable for the Purchaser to make the claim. The Council's decision on this point will be final and the Council will not enter into any correspondence about it.

(*d*) In any other case where the Purchaser does not agree with the findings of the Council but nevertheless wishes to pursue his claim the matter shall be referred to an Arbitrator appointed by the Presidents for the time being of the Royal Institute of British Architects and of the Royal Institution of Chartered Surveyors from a panel nominated by them. Any claim shall be deemed to be made on the basis of the above conditions.

For the purposes of the First and Second Schedules the word "Purchaser" shall have the following meaning:

Any person for whom a dwelling is built or to whom a dwelling is sold or leased for occupation by him or his family as a dwelling or any corporation comprised exclusively of such persons. It shall also include where the context so admits the successors in title of the Purchaser and mortgagees in possession. "Purchaser" does not mean any development company, associate or subsidiary company of the house-builder or other agency to whom the dwelling may be sold or otherwise conveyed by the house-builder for subsequent re-sale, letting or any other purpose.

APPENDIX B

Proposed Section 462 of Article 14
of the
New York REAL PROPERTY LAW

§ 462. Liability of housing merchants for breach of warranty.

1. *Express warranties.* (*a*) Express warranties by a housing merchant are created as follows:

(i) any written affirmation of fact or promise which relates to the dwelling and which is made a basis of the bargain between the housing merchant and the purchaser creates an express warranty that the dwelling shall conform to the affirmation or promise;

(ii) any written description of the dwelling, including plans and specifications thereof, which is made a basis of the bargain between the housing merchant and the purchaser creates an express warranty that the dwelling shall conform to the description;

(iii) any sample or model which is made a basis of the bargain between the housing merchant and the purchaser creates an express warranty that the dwelling shall conform to the sample or model.

(*b*) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used or that there be a specific intention to make a warranty, but an affirmation merely of the value of the dwelling or a statement purporting to be an opinion or commendation of the dwelling does not create a warranty.

2. *Implied warranties.* Unless excluded or modified pursuant to subdivision three of this section, in every sale warranties are implied that the dwelling is

(*a*) free from faulty materials,

(*b*) constructed according to sound engineering standards,

(*c*) constructed in a workmanlike manner, and

(*d*) fit for habitation,

at the time of the delivery of the deed to a completed dwelling, or at the time of the completion of a dwelling not completed when the deed is delivered, provided, however, that these warranties do not apply to any condition that an inspection of the premises would have revealed to a reasonably diligent purchaser at the time the contract was signed.

3. *Exclusion or modification of express warranties.* If an express warranty is made under paragraph (*a*) of subdivision one of this section,

neither words in the contract of sale, the deed, or other instrument of conveyance, nor merger of the contract of sale into the deed or any other instrument of conveyance shall be effective to exclude or modify such warranty, provided, however, that at any time after the execution of the contract of sale such a warranty may be excluded or modified in whole or in part by a written instrument, signed by the purchaser, which sets forth in detail the warranty to be excluded or modified, the consent of the purchaser to such exclusion or modification, and the terms of the new agreement with respect thereto.

4. *Exclusion or modification of implied warranties.* Neither words in the contract of sale, the deed, or other instrument of conveyance, nor merger of the contract of sale into the deed or any other instrument of conveyance shall be effective to exclude or modify the implied warranties, provided, however, that if the contract of sale pertains to a dwelling then completed, such warranties may be excluded or modified in whole or in part by a written instrument, signed by the purchaser, which sets forth in detail the warranty to be excluded or modified, the consent of the purchaser to such exclusion or modification, and the terms of the new agreement with respect thereto.

5. *Remedies.* In the event of the breach of any of the several warranties provided for in this section, the court may award such legal or equitable relief, or both, as justice may require.

6. *Beneficiaries.* The implied warranties provided for under this section shall extend to subsequent purchasers to whom a reasonably diligent inspection of the premises would not have revealed the breach of such warranty and who did not in fact discover it before delivery of the deed to them.

7. *Limitation of actions.* Any action arising under this section shall, subject to the provisions of article two of the civil practice law and rules, be commenced

(*a*) in the case of a dwelling completed at the time of the delivery of the deed to the purchaser, within three years after such delivery or after the taking of possession by the purchaser, whichever occurs first, and

(*b*) in the case of a dwelling not completed at the time of delivery of the deed to the purchaser, within three years from the date of completion of the dwelling or the taking of possession by the purchaser, whichever occurs first.

8. *Bonds.* Notwithstanding any agreement to the contrary, a housing merchant shall not be entitled to enforce a contract of sale of any dwelling unless he tenders with the deed or other instrument of conveyance a bond, with sufficient surety, in an amount at least equal to the sale price of the dwelling, conditioned upon the failure of the housing merchant to satisfy in full any judgment arising under this section and payable to the purchaser and his mortgagee as their interests may appear. Upon the failure of the housing merchant to make such tender, the purchaser may terminate the contract of sale and bring an action for damages suffered by reason of such terminatlon as if such contract had been breached by the housing merchant.

APPENDIX C

(1964), 12 U.S. Code § 1701 j

§ 1701j-1. Builder's certification as to construction.

(*a*) *Warranty requirements.*

The Federal Housing Commissioner is authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for not more than a four-family residence and which is approved for mortgage insurance prior to the beginning of construction, the seller or builder, and such other person as may be required by the said Commissioner to become warrantor, shall deliver to the purchaser or owner of such property a warranty that the dwelling is constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein, which have been approved in writing by the Federal Housing Commissioner) on which the Federal Housing Commissioner based his valuation of the dwelling: *Provided*, That the Federal Housing Commissioner shall deliver to the builder, seller, or other warrantor his written approval (which shall be conclusive evidence of such approval) of any amendment of, or change or variation in, such plans and specifications which the Commissioner deems to be a substantial amendment thereof, or change or variation therein, and shall file a copy of such written approval with such plans and specifications: *Provided further*, That such warranty shall apply only with respect to such instances of substantial nonconformity to such approved plans and specifications (including any amendments thereof, or changes or variations therein, which have been approved in writing, as provided herein, by the Federal Housing Commissioner) as to which the purchaser or homeowner has given written notice to the warrantor within one year from the date of conveyance of title to, or initial occupancy of, the dwelling, whichever first occurs: *Provided further*, That such warranty shall be in addition to, and not in derogation of, all other rights and privileges which such purchaser or owner may have under any other law or instrument: *And provided further*, That the provisions of this section shall apply to any such property covered by a mortgage insured by the Federal Housing Commissioner on and after October 1, 1954, unless such mortgage is insured pursuant to a commitment therefor made prior to October 1, 1954.

(*b*) *Availability of plans and specifications*

The Federal Housing Commissioner is further directed to permit copies of the plans and specifications (including written approvals of any amendments thereof, or changes or variations therein, as provided herein) for dwellings in connection with which warranties are required by subsection (*a*) of this section to be made available in their appropriate local offices for inspection or for copying by any purchaser, homeowner, or warrantor during such hours or periods of time as the said Commissioner may determine to be reasonable.